U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 21 June 2007

Case No. 2004-BLA-6229

In the Matter of

H. F.,

Claimant,

v.

ACE CONTRACTING,

Employer,

and

KENTUCKY EMPLOYERS MUTUAL INS.,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:[1]

Leonard Stayton, Esq.
Inez, Kentucky
For the Claimant

[1] The Director, Office of Workers' Compensation Programs, a party in this proceeding, was not present or represented by counsel at the hearing. By failing to appear at the hearing or participate in this case after referral to this office, the Director is deemed to have waived any issues which it could have raised at any stage prior to the close of this record. By referring this matter for hearing, the District Director is further deemed to have completed evidentiary development and adjudication as required by the regulations. 20 C.F.R. § 725.421.

Paul E. Jones, Esq.
Jones, Walters, Turner & Shelton
Pikeville, Kentucky
For the Employer

BEFORE: LARRY S. MERCK
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This case arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 ("Act"), 30 U.S.C. § 901 *et seq.*, and the regulations issued thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

Claimant filed this application for benefits on July 3, 2002. (DX 2).[2] The District Director issued a Proposed Decision and Order awarding benefits on January 5, 2004. (DX 42). The Employer requested a formal hearing. (DX 45). On May 3, 2004, this case was referred by the District Director, Office of Workers' Compensation Programs, to the Office of Administrative Law Judges for a hearing. (DX 48). A formal hearing in this matter was conducted on October 12, 2006, in Prestonsburg, Kentucky, by the undersigned. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder. The opinion which follows is based on all relevant evidence of record.

ISSUES[3]

The issues in this case are:

1. Whether Claimant has pneumoconiosis as defined in the Act and regulations;

[2] In this Decision and Order, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "TR" refers to the transcript of the hearing.

[3] At the hearing, Employer withdrew timeliness as a contested issue. Claimant and Employer also stipulated to at least fourteen years of coal mine employment. In addition, Employer maintains constitutional issues for appellate purposes only. (TR 10).

2. Whether Claimant's pneumoconiosis arose out of coal mine employment;

3. Whether Claimant is totally disabled;

4. Whether Claimant's disability is due to pneumoconiosis;

5. Whether Claimant has two dependents for the purpose of benefit augmentation; and,

6. Whether the named Employer is the Responsible Operator.

(TR 10-12; DX 48).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

Claimant was born on January 3, 1953. (TR 13; DX 2). He has an eighth grade education and has obtained his GED. *Id.* He is married and has one daughter, whom he claims as dependents for the purpose of benefit augmentation. (TR 13-14; DX 2).

At the hearing, the parties stipulated to at least fourteen years of coal mine employment. (TR 10). Claimant testified that he "hauled coal from the coal pit to the prep plant and sometimes from the prep plant to the load out and hauled some refuse from the prep plant." (TR 17; DX 21). His last coal mine employment was with T and R Trucking as a coal truck driver. (TR 16-17). Claimant also testified that Palm Memorial Gardens, Inc., which was the last employer listed on his Social Security earnings statement, was the same company as T and R Trucking. (TR 31-32). The majority of his coal mine employment he worked as a truck driver. In 1999, Claimant ceased coal mine employment because he was no longer able to work.

Claimant is currently treated by Dr. Hazeltine and was previously treated by Dr. Belhausen. (TR 20). He is prescribed medications for his breathing problems. *Id.* Claimant complains

of shortness of breath, decreased lung capacity, and inability to perform physical work. *Id*. Claimant testified that he has trouble walking long distances and lifting weights. (TR 22-23). Claimant can no longer mow his grass or hunt or fish. *Id*.

Claimant testified that he began smoking in his late teens or as an early adult. (TR 21). He stated that he smoked on average a half-pack per day, and he continues to smoke to this day. *Id*. Dr. Ammisetty reported that Claimant has smoked a pack of cigarettes a day for twenty-five years. (DX 12). Dr. Dahhan reported that Claimant has smoked between a half a pack and a pack of cigarettes a day for twenty-five years. (EX 1). Dr. Baker reported that Claimant began smoking between half a pack and a pack of cigarettes a day beginning sometime in his late teens, and continues to smoke. (CX 1). Dr. Broudy reported that Claimant began smoking as a teenager and continues to smoke at a rate of one-half to one pack of cigarettes a day. (DX 14). As the evidence is inconsistent, I am unable to make an exact determination of Claimant's smoking history at this time.

Responsible Operator and Insurer:

In order to be deemed the responsible operator for the claim, Ace Contracting ("Ace"), must have been the last employer in the coal mining industry for which Claimant had his most recent period of coal mine employment for at least one year. § 725.493.

Claimant testified that his last coal mine employment was with T & R Trucking, but that his employment with that company was less than one year. (TR 17, 32-33; DX 21). Claimant explained that prior to that he worked at least a full year for Gregory Moore, who is the owner of Ace Trucking. (TR 30-31; DX 21). This is supported by Social Security records. (DX 7). These records demonstrate that Claimant was continuously employed by Ace from 1995 to 1997. *Id*. The documentary and testimonial evidence supports the fact that Ace was the last employer for which Claimant worked for at least one year as a miner. Thus, I find that Ace Trucking is the Responsible Operator.

Length of Coal Mine Employment:

The duration of a coal miner's employment is relevant to the applicability of various statutory and regulatory presumptions. At the hearing, the parties stipulated to at least fourteen years of coal mine employment. (TR 10). Based upon my review of the record, including Claimant's Social Security

Administration Itemized Statement of Earnings, I accept the stipulation and credit Claimant with at least fourteen years of coal mine employment, as that term is defined by the Act and Regulations. (DX 7). He last worked in the Nation's coal mines in 1999 in West Virginia. (TR 19; DX 7).

Dependency:

In his application for benefits, Claimant alleged two dependents for the purpose of benefit augmentation, namely, his wife, E. B., whom he married on August 19, 1975, and his daughter, L. F., who was born on December 23, 1984. (TR 13-14; DX 8-9). The record contains Claimant's marriage certificate and his daughter's birth certificate. (DX 8, 9). The record also contains documentation that Claimant's daughter is a full-time college student; however, the record also contains her marriage license, which reflects that she was married on December 2, 2005. (DX 10; CX 6).[4] Accordingly, I find that from the date of filing until December 2, 2005, Claimant had two dependents for the purpose of benefit augmentation. Thereafter, Claimant's wife is his only dependent.

Applicable Regulations:

Claimant filed this claim on July 3, 2002. (DX 2). Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations. In addition, the Amendments to the Part 718 regulations, which became effective on January 19, 2001, are also applicable.

The 2001 amendments significantly limit the development of medical evidence in black lung claims. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. § 725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in a single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary

[4] Claimant's daughter's marriage certificate was submitted into evidence after the hearing, and accordingly, it is marked and hereby admitted as CX 7.

function test, arterial blood gas study, biopsy or autopsy. §725.414(a)(2)(ii). Likewise, employers and the District Director are subject to similar limitations on affirmative and rebuttal evidence. § 725.414(a)(3).

Pneumoconiosis:

Section 718.202(a) sets forth four alternate methods for determining the existence of pneumoconiosis. Pursuant to § 718.202, the miner can demonstrate pneumoconiosis by means of 1) x-rays interpreted as positive for the disease, or 2) biopsy or autopsy evidence, or 3) the presumptions described in §§ 718.304, 718.305, or 718.306, if found to be applicable, or 4) a reasoned medical opinion which concludes the presence of the disease, if the opinion is based on objective medical evidence such as pulmonary function studies, arterial blood gas tests, physical examinations, and medical and work histories.

Under § 718.202(a)(1), a finding of the presence of pneumoconiosis may be based upon a chest x-ray conducted and classified in accordance with § 718.102. To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories 0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis. Three x-rays have been designated as evidence by the parties in this case.

The x-ray dated September 10, 2002, was interpreted as negative for pneumoconiosis by Dr. Alex Poulos, who is a Board-certified Radiologist and B-reader.[5] (DX 12). Dr. Barrett, a Board-certified Radiologist and B-reader, re-read the x-ray for quality purposes only. (DX 13). Dr. Alexander, a Board-certified Radiologist and B-reader, interpreted the x-ray as positive for pneumoconiosis, with a 1/0 profusion. (CX 2). In addition, Dr. Wheeler, who is also a Board-certified Radiologist and B-reader, interpreted the x-ray as negative for pneumoconiosis. (DX 17).

[5] A B-reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the United States Department of Health and Human Services. 42 C.F.R. § 37.51. The qualifications of physicians are a matter of public record at the National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. Because B-readers are deemed to have more training and greater expertise in the area of x-ray interpretation for pneumoconiosis, their findings may be given more weight than those of other physicians. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986).

As this x-ray was interpreted differently by equally-qualified physicians, I find the x-ray stands in equipoise; and therefore, is inconclusive.

Dr. Broudy, a B-reader, interpreted a December 17, 2002, x-ray as negative for pneumoconiosis. (DX 14). However, the x-ray was read as positive with a 1/0 profusion, by Dr. Alexander, a Board-certified Radiologist and B-reader. (CX 3). Thus, I find this x-ray is positive for pneumoconiosis.

Dr. Dahhan, who is a B-reader, interpreted a July 28, 2003, x-ray as negative for pneumoconiosis. (EX 1). No rebuttal evidence was offered regarding this x-ray; therefore, I find this x-ray is negative for pneumoconiosis.

Under Part 718, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985). Thus, it is within the discretion of the administrative law judge to assign weight to x-ray interpretations based on the readers' qualifications. *Goss v. Eastern Associated Coal Co.*, 7 B.L.R. 1-400 (1984); *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985) (granting great weight to a B-reader); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985) (granting even greater weight to a Board-certified radiologist). In this case, one x-ray stands in equipoise, one was interpreted as positive by a dually-qualified physician, and one was interpreted as negative by a B-reader.

Accordingly, I grant more weight to the positive x-ray interpretation, which was made by the highest qualified physician, than I do to the negative x-ray interpretation, which was made by a lesser qualified physician. Therefore, I find that Claimant has established the existence of pneumoconiosis, pursuant to § 718.202(a)(1).

Pursuant to § 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in §§ 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to

claims that were filed before January 1, 1982. Finally, § 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

Under § 718.202(a)(4), the fourth and final method to establish pneumoconiosis, a determination of the disease may be made if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201, which provides the following definition of pneumoconiosis:

> (a) For purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical or 'clinical' pneumoconiosis and statutory or 'legal' pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthra-cosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

> (c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

§ 718.201.

Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and supported by a reasoned medical opinion. A reasoned medical opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Field v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. *Id.*

Dr. Sirininas Ammisetty conducted a physical examination of Claimant on September 10, 2002. (DX 12). His diagnostic testing included a pulmonary function test, arterial blood gas study, and an EKG. He attached Claimant's Form CM-911a employment history form and noted that Claimant currently smokes cigarettes and has smoked a pack of cigarettes a day for twenty-five years. His report stated that Claimant suffers from sputum production, wheezing, dyspnea on exertion, cough, chest pain, orthopnea, and paroxysmal nocturnal dyspnea. Dr. Ammisetty's notes on the chest exam were illegible, in part, but revealed wheezes. An EKG showed "NSR poor R" with the remaining notes being unreadable. *Id.* Dr. Ammisetty reviewed Dr. Poulos's negative interpretation of the September 10, 2002, chest x-ray. The pulmonary function study was qualifying and the arterial blood gas was non-qualifying.[6] Dr. Ammisetty opined that Claimant does not have clinical pneumoconiosis. However, he opined that Claimant has chronic bronchitis, cough, sputum production and chronic obstructive pulmonary disease, all of which were due to chronic smoking and coal dust exposure. In a medical questionnaire attached to his report, Dr. Ammisetty stated that Claimant has an occupational lung disease, which was caused by his coal mine employment. He based this diagnosis on Claimant's chronic cough/bronchitis, shortness of breath, and chronic obstructive pulmonary disease. He explained that Claimant has a

[6] Dr. Burki invalidated the pulmonary function study conducted on September 10, 2002, due to poor effort. Pursuant to § 725.406(c), the Department of Labor provided Claimant with a second pulmonary function study on February 26, 2003. Dr. Burki validated the second study, which also produced qualifying results. (DX 12).

moderate/severe impairment that was not related to pneumoconiosis. Dr. Ammisetty opined that Claimant does not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. He based his findings regarding total disability on Claimant's shortness of breath, wheezing, and pulmonary function studies. In his report, Dr. Ammisetty explained that Claimant's impairment is permanent, but that the extent to which chronic smoking and coal dust exposure contributed to Claimant's respiratory impairment is "difficult to assess". *Id.*

Because it is based on his review of the objective medical data, including Claimant's medical examination, work history, smoking history, history of symptoms, and a qualifying pulmonary function study, I find Dr. Ammisetty's opinion regarding legal pneumoconiosis well-reasoned and well-documented.

Dr. Glenn Baker, Board-certified in Internal Medicine and Pulmonary Diseases and a B-reader, conducted a physical examination of Claimant on January 19, 2006. (CX 1). His medical workup included a chest x-ray, pulmonary function test, and arterial blood gas study. He recorded that Claimant worked in coal mine employment for fifteen years. Dr. Baker recorded that Claimant currently smokes, and has smoked at a rate of one-half to one pack per day since his late teens. He noted that Claimant suffers from daily sputum production, daily wheezing, dyspnea on exertion, daily cough, hemoptysis, and occasional ankle edema. A chest examination showed medium to coarse wheezing bilaterally. His pulmonary function test was qualifying, and an arterial blood gas study was normal. Dr. Baker interpreted a chest x-ray as negative for pneumoconiosis, with a 0/1 profusion.[7] Dr. Baker indicated that Claimant does not have clinical pneumoconiosis. However, Dr. Baker diagnosed Claimant with pulmonary conditions that qualify as legal pneumoconiosis under the regulations. Dr. Baker made the following diagnoses: 1) chronic obstructive pulmonary disease with moderate obstructive ventilatory defect – based on pulmonary function tests; 2) chronic bronchitis - based on Claimant's history of symptoms; and 3) hypoxemia, mild to moderate – based on arterial blood gas analysis. *Id.* Dr. Baker

[7] Dr. Baker's x-ray reading was not designated as part of Claimant's affirmative evidence, pursuant to § 725.414(a)(2)(i). However, Dr. Baker's x-ray reading does not exceed the evidentiary limitations in this case, as Claimant did not designate any x-ray evidence as part of his affirmative case. (CX 6). Accordingly, Dr. Baker's report will not be discounted or discredited, as it is based on admissible evidence, which does not exceed the evidentiary limitations.

attributed all of these diagnoses primarily to cigarette smoking, but opined that coal dust exposure significantly contributed to and substantially aggravated the diseases. Dr. Baker also stated that Claimant suffers from a moderate impairment, which prevents him from performing his previous coal mine employment. Dr. Baker opined that Claimant's respiratory impairment was due to his COPD, chronic bronchitis, and hypoxemia, all of which he attributed primarily to cigarette smoking, and secondarily to coal dust exposure. *Id.*

As discussed, legal pneumoconiosis includes any chronic lung disease or impairment arising out of coal mine employment. The Board has held that chronic bronchitis falls within the definition of pneumoconiosis if it is related to claimant's coal mine employment. *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999). In his report, Dr. Baker stated that his diagnosis of chronic bronchitis was based on history. (CX 1). Dr. Baker provided a narrative explanation of his findings along with his report. It is clear from his narrative report that he considered Claimant's work and smoking histories, which he obtained as part of Claimant's examination, as well as Claimant's history of symptoms, which are suggestive of COPD, chronic bronchitis, and hypoxemia. *Id.*

The regulations specifically state that legal pneumoconiosis includes any "chronic" lung disease. Dr. Baker's diagnosis of "hypoxemia" does not fall within the regulatory definition, as it is not necessarily a chronic lung disease. However, Dr. Baker's diagnoses of COPD and chronic bronchitis do qualify as legal pneumoconiosis if they are sufficiently related to Claimant's coal mine employment.

In *Cornett v. Benham Coal, Inc.*, the Sixth Circuit held that a physician's opinion that the claimant's "obstructive ventilatory defect could have been caused by either smoking or coal dust exposure" should be viewed under the circumstances of that case as "tantamount to a finding that both coal dust exposure and smoking were operative factors and that it was impossible to allocate blame between them." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000). The Court emphasized that such a finding was sufficient to establish that the claimant's pneumoconiosis arose out of his coal mine employment, stating that:

> [U]nder the statutory definition of pneumoconiosis, Cornett was not required to demonstrate that coal dust was the *only* cause of his current respiratory

> problems. He needed only show that he has a chronic respiratory and pulmonary impairment 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'

Id. at 576 (citing 20 C.F.R. § 718.201)(emphasis in original).

The Court went on to find that the Administrative Law Judge improperly discounted the physicians' opinions, and emphasized that "accurately following the regulatory definition of pneumoconiosis cannot be grounds for rejecting a doctor's opinion." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000).

Furthermore, in *Crockett Collieries, Inc. v. Barrett*, the Sixth Circuit affirmed an Administrative Law Judge's award of benefits. *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350 (6th Cir. 2007)(J. Rogers, concurring). In *Barrett*, both Drs. Baker and Dahhan concluded that the miner suffered from a respiratory impairment. *Id.* at 356. However, they disagreed as to whether the impairment "could all be due to cigarette smoking or could be due to a combination of cigarette smoking and coal dust exposure." *Id.* Dr. Baker concluded that coal dust exposure "probably contributes to some extent in an undefinable portion" to the miner's pulmonary impairment. *Id.*

The Court agreed with the Administrative Law Judge's reasoning, holding that after invoking the rebuttable presumption that the miner's legal pneumoconiosis arose out of coal dust exposure at § 718.203(b), the Administrative Law Judge properly found Dr. Baker's opinion sufficient, and not too equivocal, to support a finding that the miner suffered from pneumoconiosis arising out of coal mine employment. *Id.* at 358; *see also Williams Mountain Coal Co. v.* Lucas, 100 Fed. Appx. 893, 897 (4th Cir. 2004)(unpub.)(holding that the Administrative Law Judge properly credited the opinion of Dr. Rasmussen, who concluded that the claimant's respiratory condition was due to cigarette smoking and coal dust exposure, over the reports of physicians who refused to consider the possibility that coal dust, in addition to cigarette smoking, caused the claimant's impairment); *Mountain Clay, Inc. v. Spivey*, 172 Fed. Appx. 641 (6th Cir. 2006)(unpub.)(holding that the Administrative Law Judge properly credited a physician's opinion, which stated that the claimant's pneumoconiosis was related to coal dust exposure, by considering other possible factors, such as smoking, age, obesity, or hypertension).

In the present case, Dr. Baker considered the objective medical data, including relevant work and smoking histories, and Claimant's history of symptoms, in diagnosing chronic bronchitis due, in part, to coal dust exposure. Dr. Baker also considered the results of the pulmonary function study, which was qualifying, in determining that Claimant's COPD was caused, in part, by dust exposure. Accordingly, I find Dr. Baker's opinion regarding legal pneumoconiosis well-reasoned and well-documented.

Dr. A. Dahhan, Board-certified in Internal Medicine and Pulmonary Diseases and a B-reader, conducted a physical examination on July 28, 2003. (EX 1). His complete medical workup included a chest x-ray, pulmonary function test, arterial blood gas study, and EKG. He recorded that Claimant worked in the coal mine industry hauling coal for fifteen years. Claimant reported that he currently smokes cigarettes and that he began smoking at the age of twenty five at a rate of one-half to one pack of cigarettes a day. Dr. Dahhan noted that Claimant suffers from clear sputum production, occasional wheezing, and dyspnea on exertion. He must sleep using two pillows to help his breathing. A chest exam was normal, and the EKG showed "regular sinus rhythm with non-specific ST changes." *Id.* Dr. Dahhan interpreted the chest x-ray as negative for pneumoconiosis. The arterial blood gas analysis was non-qualifying. The pulmonary function studies produced qualifying results both before and after the administration of a bronchodilator. *Id.*

Dr. Dahhan opined that Claimant does not have occupational pneumoconiosis or any other disease arising out of coal dust exposure.(EX 1). He based his opinion on a negative x-ray, a normal chest examination, an obstructive impairment that showed improvement after the administration of a bronchodilator, as demonstrated by Claimant's pulmonary function testing, and adequate blood gas exchange mechanisms. Dr. Dahhan diagnosed Claimant with chronic obstructive lung disease and opined that, from a respiratory standpoint, Claimant does not retain the ability to work in the coal mine industry. Dr. Dahhan opined that Claimant's lengthy smoking habit was the sole cause of his obstructive airway disease with chronic bronchitis and emphysema, and not the inhalation of coal dust or coal workers' pneumoconiosis. *Id.* At his deposition, Dr. Dahhan testified to the same. (EX 2).

In *Consolidation Coal Co. v. Swiger*, the Fourth Circuit Court of Appeals upheld an Administrative Law Judge's finding that the reversibility of pulmonary function values after use of

a bronchodilator does not preclude the presence of disabling coal workers' pneumoconiosis. *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.). In particular, the court noted the following:

> All the experts agree that pneumoconiosis is a fixed condition and therefore any lung impairment caused by coal dust would not be susceptible to bronchodilator therapy. In this case, although Swiger's condition improved when given a bronchodilator, the fact that he experienced a disabling residual impairment suggested that a combination of factors was causing his pulmonary condition. As a trier of fact, the ALJ 'must evaluate the evidence, weigh it, and draw his own conclusions.' (citation omitted). Therefore, the ALJ could rightfully conclude that the presence of the residual fully disabling impairment suggested that coal mine dust was a contributing cause of Swiger's condition. (citation omitted).

Id.

In this case, Dr. Dahhan relies on the improvement in Claimant's pulmonary function results after the administration of a bronchodilator in determining that Claimant's impairment is related solely to his smoking history. However, Dr. Dahhan fails to consider that Claimant's post-bronchodilator still produced qualifying results.

In addition, in *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, the Fourth Circuit concluded that the ALJ properly accorded less weight to the opinion of Dr. Forehand, who found that the miner was totally disabled due to smoking-induced bronchitis, but failed to explain "how he eliminated (the miner's) nearly thirty years of exposure to coal mine dust as a possible cause" of the bronchitis. In affirming the ALJ, the court noted that "Dr. Forehand erred by assuming that the negative x-rays (underlying his opinion) necessarily ruled out that (the miner's) bronchitis was caused by coal mine dust ...." *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, Case No. 03-1232 (4th Cir. Apr. 5, 2004) (unpub.).

Moreover, in *Crockett Collieries, Inc. v. Director, OWCP [Barrett]*, the Sixth Circuit Court of Appeals agreed with the

administrative law judge's weighing of the medical evidence and affirmed the claimant's award of benefits, noting that:

> In rejecting Dr. Dahhan's opinion, the ALJ found that Dahhan had not adequately explained why Barrett's responsiveness to treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis, and had not adequately explained 'why he believes that coal dust exposure did not exacerbate (the miner's) allegedly smoking-related impairments.'

Crockett Collieries, Inc. v. Director, OWCP [Barrett], ___ F.3d ___, 2007 WL 494664, Case No. 05-4188 (6th Cir. Feb. 16, 2007)(J. Rogers, concurring); *see also Mountain Clay, Inc. v. Spivey*, 172 Fed. Appx. 641 (6th Cir. 2006)(unpub.).

In the present case, Dr. Dahhan failed to sufficiently explain the significance of Claimant's responsiveness to bronchodilators, particularly because Claimant's improved results are still qualifying under the regulations. Additionally, Dr. Dahhan did not adequately explain why he believes that coal dust exposure did not contribute to Claimant's impairment. Instead he chose to rely solely on smoking history, apparently without considering whether both cigarette smoking and coal dust exposure had a concurrent effect in causing chronic obstructive lung disease. For the reasons stated above, I find Dr. Dahhan's opinion regarding legal pneumoconiosis insufficiently reasoned and I grant it little probative weight.

Dr. Bruce Broudy, Board-certified in Internal Medicine and Pulmonary Diseases, conducted a physical examination on December 17, 2002. (DX 14). His medical workup included a chest x-ray, pulmonary function test, and arterial blood gas study. He recorded that Claimant worked in the coal mine industry on and off for over twenty-two years. Dr. Broudy recorded that Claimant began smoking when he was a teenager, and that he currently smokes at a rate of one-half to one pack of cigarettes a day. Dr. Broudy reported that Claimant suffers from dyspnea on exertion, a history of wheezing, and shortness of breath. A chest examination showed lungs that were "notable for severe expiratory delay with marked wheezing" with diminished breath sounds. *Id.* Dr. Broudy interpreted the chest x-ray as negative for pneumoconiosis, although the same x-ray was re-read as positive by a physician with higher radiological qualification. (CX 3, EX 14). The arterial blood gas analysis was non-qualifying. (DX 14). However, the pulmonary function test

produced qualifying results both before and after the administration of bronchodilators. *Id.*

Dr. Broudy diagnosed severe chronic obstructive airways disease, with some responsiveness to bronchodilation. (DX 14). However, he opined that Claimant does not have coal workers' pneumoconiosis or any other lung disease caused by the inhalation of coal dust. In addition, he stated that Claimant is not able to perform his previous coal mine employment or similarly arduous manual labor. He attributed Claimant's pulmonary impairment to his chronic obstructive airways disease, which Dr. Broudy determined to be caused by cigarette smoking, and possibly asthma or bronchospasm. Dr. Broudy explained that he ruled out coal dust exposure as a cause of Claimant's obstructive impairment, because coal workers' pneumoconiosis is usually restrictive in nature, rather than obstructive. *Id.* At his deposition, Dr. Broudy testified to the same. (DX 16).

Dr. Broudy prepared a supplemental report on May 3, 2006, in which he reviewed and criticized Dr. Baker's medical report. (EX 3). He explained that he does not agree with Dr. Baker's opinion that Claimant's moderately severe obstructive airways disease may be causally related to his history of coal dust exposure. In support of his argument, Dr. Broudy noted that Claimant has not had any coal dust exposure for almost nine years prior to Dr. Baker's examination. Dr. Broudy reiterated his earlier assertions that coal dust usually causes a restrictive impairment, while Claimant's impairment is more obstructive in nature, thus ruling out pneumoconiosis. *Id.*

As discussed *supra*, the regulatory definition of legal pneumoconiosis expressly "includes, but is not limited to, any chronic restrictive *or obstructive* pulmonary disease arising out of coal mine employment." § 718.201(a)(2)(emphasis added). In *Midland Coal Co. v. Director, OWCP [Shores]*, the Seventh Circuit held that the Administrative Law Judge properly discredited a physician's report that "referenced parts of the medical literature that deny that coal dust exposure can ever cause pneumoconiosis", and where the physician stressed the absence of chest x-ray evidence of the disease and erroneously relied on "the absence of pulmonary problems at the time of (the miner's) retirement from coal mining." *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004).

The Court held that the physician's second assertion is contrary to the premise, which is expressly incorporated into the regulations, that pneumoconiosis may be latent and

progressive. *Id.* In pertinent part, § 718.201(c) states that, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

In his supplemental report, in support of his opinion regarding the etiology of Claimant's pulmonary impairment, Dr. Broudy stated that Claimant has not been exposed to coal dust since he left the mines almost nine years prior to his examination. However, this reasoning ignores the premise that pneumoconiosis is a latent and progressive disease. Accordingly, I find that this assertion does not amount to a reasoned and documented opinion regarding legal pneumoconiosis.

In addition, Dr. Broudy supports his finding that Claimant's chronic obstructive airways disease was caused by cigarette smoking, and possibly by asthma or bronchospasm, by asserting that coal dust exposure does not usually cause an obstructive impairment, and therefore, Claimant's pulmonary condition was not caused by his dust exposure. For the reasons discussed above in regards to *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), I find Dr. Broudy's opinion inadequately reasoned and unsupported by the medical evidence.

Furthermore, in his supplemental report and deposition, Dr. Broudy argued that if Claimant's condition was caused by coal dust exposure, there would be evidence of coal workers' pneumoconiosis on Claimant's x-rays. (DX 16; EX 3). However, Dr. Broudy, a B-reader, failed to take into account the fact that the x-ray that he interpreted as negative was re-read as positive by a dually-qualified physician. (CX 3). In addition, I have found that Claimant has established pneumoconiosis by a preponderance of the x-ray evidence, pursuant to § 718.202(a)(1). In his supplemental report, Dr. Broudy explicitly relies on his negative reading of Claimant's x-ray, and a supposed lack of x-ray evidence proving pneumoconiosis in this case, as support for his opinion that Claimant's pulmonary condition is not causally-related to coal dust exposure. Therefore, I find his opinion regarding legal and clinical pneumoconiosis is insufficiently reasoned, and I grant it little probative weight.

In sum, for any of the reasons stated above, I find that Dr. Broudy's opinion regarding pneumoconiosis is not well-reasoned and entitled to little probative weight.

Claimant designated the following documentation as treatment notes: 1) a handwritten note by Dr. F. Belhasen, Claimant's treating physician; 2) the results of a CT scan ordered by Dr. Dahhan, which was performed on July 28, 2003; and, 3) the qualifying results of a pulmonary function test performed on June 10, 2002. (CX 6; DX 20).

In *Presley v. Clinchfield Coal Co.*, BRB No. 06-0761 BLA (April 30, 2007), the Board held that the Administrative Law Judge erred in admitting and considering a physician's letter as a treatment note that was exempt from the evidentiary limitations, as the Board determined that the letter constituted "a 'physician's written assessment of the miner's respiratory or pulmonary condition,' and not a record of the miner's 'medical treatment for a respiratory or pulmonary or related disease,' as contemplated by Section 725.414(a)(4)." *Id.* Similarly, Dr. Belhasen's letter falls outside the definition of a treatment note. However, in the present case, Claimant has only designated one medical report as part of his affirmative case, pursuant to § 725.414(a)(2)(i). Accordingly, the inclusion of Dr. Belhasen's letter as a medical report would not exceed the evidentiary limitations. Therefore, Dr. Belhasen's medical report will be considered herein.

By letter, dated August 14, 2003, Dr. Belhasen stated that based on Claimant's pulmonary function study, and his work history, it is his opinion that Claimant has "significant obstructive and restrictive disease." (DX 20). He also opined that Claimant "is totally disabled for coal mining." *Id.* Furthermore, he determined that Claimant's more than twenty-year history of coal dust exposure "contributed to his pulmonary impairment." *Id.* Therefore, because Dr. Belhasen's report is based on his treatment of Claimant, including his consideration of Claimant's relevant work history, and a qualifying pulmonary function test, I find his opinion regarding pneumoconiosis adequately reasoned and documented to support a finding of legal pneumoconiosis, and accord it appropriate weight.[8]

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[8] As Claimant's treating physician, Dr. Belhausen is not automatically entitled to additional weight. In *Consolidation Coal Co. v. Director, OWCP* [*Held*], 314 F.3d 184 (4th Cir. 2002), the Court held that it was improper to accord "great weight" to the opinion of a physician merely because he treated Claimant and examined him each year over the past ten years. The court stated the following:

> The ALJ's treatment of Dr. Tsai (Claimant's treating physician) was inconsistent with the law. In *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093 (4th Cir. 1993), we clearly stated that '[n]either this circuit nor the Benefits Review Board has ever

The record includes two CT scans: the first performed by Dr. Jim Carrico on June 25, 2002, at Paul B. Hall Regional Medical Center, and the second conducted on July 28, 2003, at Appalachian Regional Healthcare, in Harlan, Kentucky. (DX 15, 20). In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the Board held that the Administrative Law Judge did not abuse his discretion in excluding CT-scan evidence proffered by the employer based on the employer's failure to demonstrate that the test was (1) medically acceptable, and (2) relevant to establishing or refuting the claimant's entitlement to benefits. In accepting the Director's position on this issue, the Board held that, because CT-scans are not covered by specific quality standards under the regulations, the proffering party bears the burden of demonstrating that the CT-scans were "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." *Id.; see also* § 718.107(b). In the present case, neither party demonstrated that either of the CT scans was medically acceptable and relevant to establishing or refuting Claimant's entitlement of benefits. As such, neither CT scan will be considered.

Employer also submitted and designated the medical report and deposition of Dr. Branscomb as rebuttal to medical report of Dr. Ammisetty, which was completed as part of Claimant's DOL-sponsored medical evaluation. However, the regulations do not provide for rebuttal evidence for medical reports. *See* §§ 725.414(a)(2)(ii) and 725.414(a)(3)(iii). Moreover, Employer has already designated two medical reports, by Drs. Dahhan and Broudy, pursuant to § 725.414(a)(3)(i). Accordingly, as Employer has not shown good cause for the inclusion of evidence that exceeds the evidentiary limitations, as required by § 725.456(b)(1), Dr. Branscomb's report and deposition will not be considered.

> fashioned either a requirement or a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians.' (citations omitted). That statement is still true today. Thus, while Dr. Tsai's opinion may have been entitled to special consideration, it was not entitled to the great weight accorded it by the ALJ.

There is no evidence in the record to establish the nature and duration of Claimant's doctor-patient relationship with Dr. Belhasen or the extent and frequency of the treatment, as required by § 718.104(d). Accordingly, I grant Dr. Belhasen's opinion no additional weight due to his position as Claimant's treating physician.

Therefore, I find that Claimant has established the existence of pneumoconiosis by a preponderance of the evidence pursuant to § 718.202(a)(4). I rely on the well-reasoned and well-documented medical reports of Drs. Ammisetty, Baker, and Belhasen.

In weighing all the evidence together, as required by *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), I find that Claimant has established pneumoconiosis, under § 718.202(a), by a preponderance based on the x-ray evidence and medical reports previously discussed.

Causal Relationship Between Pneumoconiosis and Coal Mine Employment:

The Act and the regulations provide for a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a miner with pneumoconiosis was employed in the mines for ten or more years. 30 U.S.C. § 921(c)(1); § 718.203(b). As discussed above, I have found that Claimant has established pneumoconiosis based on the evidence of record and that he worked in the coal mines for at least fourteen years. As Employer's evidence is insufficient to rebut the presumption provided in § 718.203(b), I find that Claimant has established that his pneumoconiosis arose out of his coal mine employment.

Total Disability:

Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. § 718.204(b). Total disability can be established pursuant to one of the four standards in § 718.204(b)(2) or the irrebuttable presumption of § 718.304, which is incorporated into § 718.204(b). The presumption is not invoked here because there is no x-ray evidence of large opacities classified as category A, B, or C, and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in § 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under § 718.204(c), the precursor to § 718.204(b)(2), that all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R.

1-195, 1-198 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231, 1-232 (1987). Furthermore, Claimant must establish this element by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986).

Subsection (b)(2)(i) of § 718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV_1[9] values less than or equal to the values specified in the Appendix to Part 718 and such tests reveal FVC[10] or MVV[11] values equal to or less than the applicable table values. Alternatively, a qualifying FEV_1 reading together with an FEV_1/FVC ratio of 55% or less may be sufficient to prove disabling respiratory impairment under this subsection of the regulations. § 718.204(b)(2) and Appendix B. The record consists of five pulmonary function studies, dated February 26, 2003,[12] December 17, 2002, June 10, 2002, January 19, 2006, and July 28, 2003. (DX 12, 14, 20; CX 1; EX 1).

Of the five pulmonary function studies, the studies ordered as part of Claimant's examinations by Drs. Dahhan and Broudy included testing after the administration of a bronchodilator. (EX 1; DX 14). All of the studies of record, including the post-bronchodilator studies, produced qualifying results.[13] (DX 12, 14, 20; CX 1; EX 1). Thus, I find the pulmonary function study evidence of record establishes total disability by a preponderance of the evidence under subsection (b)(2)(i).

Section 718.204(b)(2)(ii) provides for the establishment of total disability through the results of arterial blood gas tests. Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of pCO_2 to pO_2, which indicates the presence of a totally disabling impairment in the transfer of oxygen from Claimant's lung alveoli to his

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[9] Forced expiratory volume in one second.

[10] Forced vital capacity.

[11] Maximum voluntary ventilation.

[12] As previously noted, Dr. Burki invalidated Dr. Ammisetty's September 10, 2002, pulmonary function study, due to poor patient effort. In compliance with the regulations, Claimant was provided a second chance to undergo Department-sponsored testing on February 26, 2003. Dr. Burki determined that the second study was valid.

[13] The fact-finder must resolve conflicting height of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). Using the average height recorded on the reports, I find Claimant's height to be 64.2 inches.

blood. § 718.204(c)(2) and Appendix C. The test results must meet or fall below the table values set forth in Appendix C following Section 718 of the regulations. Four studies have been entered into the record, all of which were non-qualifying. (DX 12, 14; CX 1; EX 1). Therefore, I find that the blood gas study evidence of record does not establish total disability by a preponderance of the evidence under subsection (b)(2)(ii).

Total disability under § 718.204(b)(2)(iii) is inapplicable because Claimant failed to present evidence of cor pulmonale with right-sided congestive heart failure.

Where total disability cannot be established under subparagraphs (b)(2)(i), (b)(2)(ii) or (b)(2)(iii), § 718.204(b)(2)(iv) provides that total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable gainful work.

Drs. Ammisetty, Baker, Belhasen, Dahhan, and Broudy all opined that Claimant has a totally disabling pulmonary impairment and that he cannot return to his prior coal mine employment. (DX 12, 14; EX 1; CX 1). As all physicians of record diagnosed Claimant as being totally disabled, Claimant has proven total disability per § 718.204(b)(2)(iv).

In sum, after weighing the evidence regarding total disability together, I rely on the medical reports and the qualifying pulmonary function studies to find that Claimant has established total disability pursuant to § 718.204 by a preponderance of the evidence.

Total Disability Due to Pneumoconiosis:

Unless one of the presumptions at §§ 718.304, 718.305, or 718.306 is applicable, a miner must establish that his or her total disability is due, at least in part, to pneumoconiosis. The Board has held that "[i]t is [the] claimant's burden pursuant to § 718.204 to establish total disability due to pneumoconiosis . . . by a preponderance of the evidence." *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986) (en banc).

The regulations state that a claimant "shall be considered totally disabled due to pneumoconiosis if pneumoconiosis ... is

a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." § 718.204(c)(1). Pneumoconiosis is considered a "substantially contributing cause" of the claimant's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

§ 718.204(c)(1).

In interpreting this requirement, the United States Court of Appeals for the Fourth Circuit has stated pneumoconiosis must be a "contributing cause" to the miner's disability. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990).

The Board has held that it is proper to accord less weight to physicians' opinions, which found that pneumoconiosis did not contribute to the miner's disability, on grounds that the physicians did not diagnose pneumoconiosis, contrary to the Administrative Law Judge's finding that pneumoconiosis has been established. *Osborne v. Clinchfield Coal Co.*, BRB No. 96-1523 BLA (Apr. 30, 1998). In addition, the Fourth Circuit has held that the Administrative Law Judge must provide specific and persuasive reasons for giving weight to the opinion of a physician who found that the miner does not have legal or medical pneumoconiosis, or any other condition aggravated by coal dust, in cases in which pneumoconiosis has been established. *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002)(citing to *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109 (4th Cir. 1995)).[14] Furthermore, the Court held that such an opinion should "carry little weight, at the most." *Id.*

[14] In *Scott*, the Court distinguished its earlier holdings in *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995); *Dehue Coal Co. v. Ballard*, 65 F. 3d 1189 (4th Cir. 1995); and Piney Mountain Coal Co. v. Mays, 176 F.3d 753, 761-62 (4th Cir. 1999). In *Hobbs* and *Ballard*, the Court had held that an administrative law judge is permitted to rely on the disability causation opinion of a physician who did not find coal workers' pneumoconiosis, if the doctor had diagnosed the claimant with, or found symptoms consistent with, legal pneumoconiosis. In *Scott*, citing to *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109 (4th Cir. 1995), the Court held that the *Hobbs*/*Ballard*/*Mays* analysis does not apply in cases in which the physician's opinion contains no diagnosis of legal or clinical pneumoconiosis, no diagnosis of any condition

The pertinent facts in this case are nearly identical to those in *Scott* and *Toler*, and are similarly distinguishable from those in *Hobbs*, *Ballard*, and *Mays*.

Accordingly, because Drs. Broudy and Dahhan did not diagnose clinical or legal pneumoconiosis, or any other condition that aggravated by Claimant's coal dust exposure, contrary to my findings herein, I grant their opinions regarding total disability causation little weight.

Dr. Ammisetty opined that it was difficult to assess the extent to which Claimant's chronic bronchitis and COPD, both of which were attributable to chronic smoking and coal dust exposure, contribute to what he determined to be a permanent and total pulmonary disability. (DX 12). He based his opinion on Claimant's shortness of breath, wheezing, and the results of his pulmonary function study, which was qualifying. Dr. Ammisetty did not specifically apportion the contribution that Claimant's smoking and coal dust exposure made to his total disability, stating that determining the contribution by each is "difficult to assess." *Id.*

In *Consolidation Coal Co. v. Swiger*, the Court disagreed with the Employer's argument that there was insufficient evidence to conclude that the miner's respiratory disability was due to pneumoconiosis because the physicians "could not apportion the relative effects of tobacco use and coal mine dust exposure . . .." *Consolidation Coal Co. v. Swiger,* Case No. 03-1971 (4th Cir. 2004), (unpub.). Citing to *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000), with approval, the Court held that physicians are not required to precisely determine the percentages of contribution to total disability; rather, "[t]he ALJ needs only to be persuaded, on the basis of all available evidence, that pneumoconiosis is a contributing cause of the miner's disability."

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the Board determined that the Administrative Law Judge properly found that a physician's opinion that coal workers' pneumoconiosis constituted one of two causes of Claimant's totally disabling respiratory impairment satisfied the causation standard at § 718.204(c)(1). Citing to *Gross v. Dominion Coal Corp.*, 23 B.L.R. 1-8, 1-17 to 1-19

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aggravated by coal dust, or no finding of symptoms related to coal dust exposure. *Scott*, 289 F.3d 263, 269 (4th Cir. 2002).

(2004), the Board noted that a medical opinion that pneumoconiosis "was one of two causes" of the miner's total disability met the "substantially contributing cause" standard.

In *Consolidation Coal Co. v. Director, OWCP [Williams],* 453 F.3d 609 (4th Cir. 2006), the Court held that the Administrative Law Judge properly credited a physician's opinion that the miner's airflow obstruction was caused by cigarette smoking as well as coal dust exposure. The employer had argued that the opinion was flawed because the physician did not "apportion [the claimant's] lung impairment between cigarette smoke and coal mine dust exposure...." *Id.* The Court disagreed and held that physicians need not make "such particularized findings." *Id.*

Accordingly, in line with this precedent, I find that Dr. Ammisetty's determination that Claimant is permanently disabled and unable to return to his previous coal mine employment due to his diagnoses of chronic lung diseases that qualify as legal pneumoconiosis, which Dr. Ammisetty related to both chronic smoking and coal dust exposure, is sufficient to meet the contributing cause standard. As such, I find his opinion regarding total disability causation well-reasoned and well-documented.

Upon considering Claimant's occupational and smoking histories, chest x-ray, pulmonary function study, and arterial blood gas analysis, Dr. Baker opined that Claimant's legal pneumoconiosis was predominately caused by cigarette smoking, but he further explained that "there is still a significant contribution and substantially aggravating factor secondary to coal dust exposure." (CX 1). Dr. Baker's opinion regarding total disability causation is based on his consideration of Claimant's work and smoking histories, symptoms, and the objective medical data obtained during his examination; therefore, I find Dr. Baker's opinion regarding disability causation well-reasoned and well-documented.

By letter dated August 14, 2003, Dr. Belhasen diagnosed Claimant with legal pneumoconiosis, and opined that Claimant was totally disabled from coal mine employment. (DX 20). Based on Claimant's qualifying pulmonary function study and significant history of coal dust exposure, Dr. Belhasen opined that Claimant's exposure to coal dust "contributed to his pulmonary impairment." *Id.* Because it is based on his consideration of Claimant's relevant history of coal dust exposure and the results of objective medical testing, I find Dr. Belhasen's

opinion regarding disability causation well-reasoned and well-documented.

Therefore, I find that Claimant has established total disability due to pneumoconiosis. I rely on the well-reasoned and well-documented medical reports of Drs. Ammisetty, Baker, and Belhasen.

Entitlement:

As Claimant has established pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis, he is entitled to benefits under the Act.

Date of Entitlement:

Section 725.503 provides that benefits are payable to a miner who is entitled beginning with the month of the onset of total disability due to pneumoconiosis. Where the evidence does not establish the month of onset, benefits shall be payable to the miner beginning with the month during which the claim was filed.

The record in this case does not contain any medical evidence establishing exactly when Claimant became totally disabled. Therefore, payment of benefits is established as of July 2002, the month and year in which Claimant filed this claim for benefits.

Attorney's Fees:

No award of attorney's fees for service to Claimant is made herein because no application has been received from counsel. A period of thirty (30) days is hereby allowed for the Claimant's counsel to submit an application. *Bankes v. Director,* 8 BLR 2-1 (1985). The application must conform to §§ 725.365 and 725.366, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including Claimant and Solicitor as counsel for the Director. Parties so served shall have twenty (20) days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge Claimant any fee in the absence of the approval of such application.

ORDER

It is HEREBY ORDERED that

1. The claim of H. F. for benefits under the Act is hereby GRANTED;

2. Ace Contracting, as insured by Kentucky Employers Mutual Ins., shall pay H. F. all benefits to which he is entitled to under the Act;

3. Ace Contracting, as insured by Kentucky Employers Mutual Ins., shall refund to the Black Lung Disability Trust Fund all benefits, plus interest, if previously paid on behalf of H. F.; and,

4. Ace Contracting, as insured by Kentucky Employers Mutual Ins., shall pay Claimant's attorney, Leonard Stayton, fees and expenses to be established in a supplemental decision and order.

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LARRY S. MERCK
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the District Director's office. *See* §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to § 725.479(a).